In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No.

VALLEY FORD SALES, INC., doing business as Friendly Ford (formerly doing business as Paul Johnson Ford), *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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To the Honorable Warren Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of the above named petitioner for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, made

and entered by said court on the 28th day of January, 1972, respectfully shows to this honorable court:

OPINIONS AND JUDGMENT BELOW

The decision and order of the National Labor Relations Board, hereinafter sometimes referred to as "Board", is reported at 182 NLRB No. 94. A copy of said decision and order is appended to this petition as Appendix I.

A copy of the judgment of the court below is appended to this petition as Appendix II.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The date of the judgment of the Court of Appeals sought to be reviewed is January 28, 1972, and the time of its entry is January 28, 1972.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is Title 28 of the United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Whether, under Section 9(b) of the Labor-Management Act, as amended [29 U.S.C. §151, et seq.], the appropriate bargaining unit is the new and used car salesmen of all of the members of the Fresno Motor Car Dealers Association, sometimes hereinafter referred to as "Association", rather than the new and

used car salesmen of Valley Ford Sales, Inc., doing business as Friendly Ford, and formerly doing business as Paul Johnson Ford, hereinafter referred to as "Company".

2. Whether an authorized representative of International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87, sometimes hereinafter referred to as the "Union", executed the representation petition pursuant to Section 9(c)(1)(A) of the Labor-Management Relations Act, 1947, as Amended.

3. Whether the Hearing Officer, in proceedings before the Board, erred in permitting Mr. Roy Whitely to testify to the contents of rules of the International Association of Machinists and Aerospace Workers, AFL-CIO, over the Company's objection that such testimony was not the best evidence and thereby impaired the Company's right to a fair hearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United State provides in pertinent part as follows:

> ". . . nor (shall any person) be deprived of life, liberty, or property, without due process of law . . ."

The statute describing the situations in which a writ of certiorari may be filed with the Supreme Court, 28 USC §1254(1), reads in pertinent part as follows:

"By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

This case also involves §§8(a)(1), 8(a)(5), 9(b), 9(c)(1)(A) and 10(e) of Labor Management Relations (Taft-Hartley) Act, 1947, as amended, 29 USC §151, et seq., and §102.66(b) of the Rules and Regulations and Statement of Procedure of the National Labor Relations Board. These sections are reprinted in Appendix III, pp. xxi-xxiv, infra.

STATEMENT OF THE CASE

1. The Company, a California corporation, sells new and used automobiles in Fresno, California. On the 25th day of September, 1968, the Union petitioned the Board for a representation election among certain of the Company's employees. The Company opposed the petition, contending (a) that the only appropriate unit was a multi-employer unit consisting of all the salesmen employed by the members of the Association, of which the Company is a member, and (b) that the petition had not been signed by an authorized representative of the Union.

The Board's Regional Director conducted a hearing on the issues raised by the petition and the Company's contentions and on the 3rd day of January, 1969, issued a Decision directing an election in the following unit, which he found appropriate for collective bargaining:

All new car, used car, fleet and truck department salesmen employed at the Company's Fresno, California operations, excluding all other employees, guards and supervisors, as defined in the Act.

The evidence introduced at the hearing provides a historical and geographical comparison (with respect to labor relations) between the Peninsula Automobile Dealers Association and the Fresno Motor Car Dealers Association.

The Peninsula Automobile Dealers Association encompasses dealers doing business in all of San Mateo County, and the Palo-Alto-Mountain View-Los Altos areas of Santa Clara County. Some 500 square miles are involved and the population of the area is 691,000. There are 56 members of the Peninsula Automobile Dealers Association and there are some 14 dealerships which are located within the geographical confines of the Association which are not members. The Machinists Union represents the mechanics hired by members of the Peninsula Automobile Dealers Association, while some parts men and employees are represented by the Teamsters Union. Machinists do not represent salesmen employed by the Peninsula Automobile Dealers Association. There are some 2,100 employees employed by members of the Peninsula Automobile Dealers Association, of which approximately 1,200 are represented by two unions. E-Z Davies Company is a member of the Peninsula Automobile Dealers Association.

The collective bargaining history between the Fresno Motor Car Dealers Association, of which the Company

is a member, and the Union, goes back at least to the early 1940's. The bargaining history concerns employees other than salesmen. There has been no labor-management agreement between any members of the Association and any union organization except District Lodge No. 87. At the time of the hearing, there were approximately 895 employees employed by members of the Association. Of these employees, some 163-165 were salesmen.

It was noted that salesmen tended to move from one dealership to the other in the Fresno area when changing jobs, and are usually local residents.

Members of the Association operate in a 50-square-mile area (37 square miles in the City of Fresno and 13 square miles in the City of Clovis). Within this area there are 11 members. Clovis is seven miles from Fresno. The population of the City of Fresno is approximately 160,000 and the population of the City of Clovis is approximately 11,000.

A Request for Review was filed by the Company on or about the eighth day of January, 1969, with the Board. By a telegram dated January 30, 1969, the Board advised the Company:

> "It is hereby ordered that the Employer's and the Intervenor's[1] (The Fresno Motor Car Dealers Association) joint request for review of the Acting Regional Director's Decision and Direction of Election be, and it hereby is, denied as it raises no substantial issues warranting review. By Direction of the Board."

[1]The Fresno Motor Car Dealers Association intervened in the proceedings before the Board.

It is not disputed that the Company refused to bargain with the Union on the ground that the single company unit was "not the appropriate unit for bargaining."

The General Counsel for the Board issued a complaint in which it was alleged that the Company had refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act. The Company, by its Answer, admitted the refusal to bargain. The Company denied, however, that the unit was appropriate. The General Counsel of the Board, on the 12th day of August, 1969, moved the Board for summary judgment on the basis of said admissions. The Company reasserted, in opposition to the motion for summary judgment, that the unit was inappropriate and also renewed its earlier contention that the Petition was not signed by an authorized agent.

On the 22nd day of May, 1970, the Board granted the General Counsel's Motion for Summary Judgment. In its Order it directed that the Company cease and desist from refusing to bargain with the Union or from any like or related manner interfering with the employees in the exercise of their rights under the Act.

ARGUMENT

I

WHERE THE FACTS REFLECT THAT (1) THERE HAS BEEN A MULTI-EMPLOYER BARGAINING UNIT FOR SOME 30 YEARS; (2) THE MULTI-EMPLOYER BARGAINING GROUP HAS BEEN THE SOLE BARGAINING REPRESENTATIVE OF ITS MEMBERS FOR SOME 30 YEARS; (3) THE MULTI-EMPLOYER BARGAINING UNIT HAS BARGAINED EXCLUSIVELY WITH DISTRICT LODGE NO. 87 FOR AND ON BEHALF OF LODGE NO. 1309; (4) THE BARGAINING BY AND BETWEEN THE UNIT AND THE MULTI-EMPLOYER GROUP HAS BEEN FOR A CONTRACT FOR MECHANICS AND PARTS MEN; THERE EXISTS A HOMOGENEOUS GROUP OF SALESMEN EMPLOYED BY MEMBERS OF AN EMPLOYER GROUP WITHIN A RELATIVELY SMALL GEOGRAPHICAL AREA, AND (6) THE MULTI-EMPLOYER GROUP HAS ONLY 11 MEMBERS, IT IS IMPERATIVE THAT, UNDER SECTION 9(b) OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, AS AMENDED, THE APPROPRIATE BARGAINING UNIT BE THE NEW AND USED CAR SALESMEN OF ALL OF THE MEMBERS OF THE FRESNO MOTOR CAR DEALERS ASSOCIATION RATHER THAN THE NEW AND USED CAR SALESMEN OF VALLEY FORD SALES, INC., DOING BUSINESS AS FRIENDLY FORD.

A. The fact that there is great mobility between dealerships which are members of the Association indicates that the duties, skills and working conditions of the salesmen employed by such members are essentially the same.

It has been said in some Board decisions that employees who do the same type of work may constitute an appropriate bargaining unit because they have the same problems with regard to hours, wages and other conditions of employment. *Carbide & Carbon Chemical Corporation,* 116 NLRB 1843 (1956). But assuming that certain employees have different duties, they may still be placed in the same bargaining unit if their wages, hours and working conditions are similar. *Town & Country Shoes,* 101 NLRB 290 (1952). In any event,

the Board has repeatedly refused to consider differences in the method of pay as determinative of the scope of an appropriate unit. *E. F. Drew & Company,* 133 NLRB 155 (1961); *Minneapolis Honeywell Regulator Company,* 115 NLRB 344 (1956).

In the case before us, the duties, skills and working conditions of employees of all members of the Association are essentially the same. It is obvious that the technique used by a salesman for one company to sell an automobile is not essentially different from the technique used by another automobile salesman from the fact that the salesman are prone to transfer frequently between dealerships who are members of the Association. In other words, the skills and duties which are employed in one dealership are readily transferable to another.

B. The history of collective bargaining between the Fresno Motor Car Dealers Association and the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87, would make it imperative that the Board find that the appropriate bargaining unit in this case is all new and used car salesmen employed by members of the Fresno Motor Car Dealers Association.

The past history of collective bargaining is a persuasive factor in determining the appropriate unit. The Board may not feel itself bound by past history of bargaining, but it has shown a propensity not to disturb a prior finding as to an appropriate unit if collective bargaining has followed the pattern of the prior Board determined unit for any appreciable length of time. *Murray Company of Texas,* 107 NLRB 1571 (1954); *Moore-McCormack Lines, Inc.,* 139 NLRB 796 (1962). The Board has taken the position

from time to time that a history of bargaining for one group of employer's organized employees is not controlling for the employer's unorganized employees. *Joseph E. Seagram & Sons, Inc.*, 101 NLRB 101 (1952). Also see *NLRB v. E-Z Davies Chevrolet*, 161 NLRB Nos. 124, 122 (1968), Board's order enforced 395 F.2d 191 (C.A. 9, 1968).

Prior to 1952, the Board had a policy of approving multi-plant and multi-employer units. However, this policy was modified to a degree in the *Seagram* case, supra. *E-Z Davies* is just one of a line of cases following *Seagram*.

In the *Seagram* case, the union sought to organize guards in several of the employer's plants on a single-plant unit basis. The employer, who had plants in several states many miles apart, argued that the appropriate bargaining unit should include guards in all of its plants. There was no history of collective bargaining for any of the employer's plant gurads. For a period of 15 years, the employer had bargained collectively on a multi-plant employer-wide basis with various labor organizations representing 11 classifications of employees. The employer's District Director of Labor Relations, located at the Central Production Offices, had conducted all negotiations on behalf of the employer.

At page 102, the Board's Opinion states:

> "The Board is satisfied that the earlier *Seagram* doctrine which in practice required one group of employees to organize on a multi-plant basis wherever other types of employees had previously

> organized themselves on that basis, should no longer be followed in every instance. . . . For the Board to continue to insist that employees who seek to organize for the first time do so only in a hearing comprising employees in 15 plants spread over hundreds of miles of territory would be in practical effect to deny them the right to collective bargaining in the fullest freedom and exercising of rights guaranteed by this Act."

At page 104, the Board's reasoning becomes apparent:

> "Considering the lack of bargaining history for guards, their special attributes, the wide geographical dispersal of the employer's plants, the degree of local control and the nature of their present organization, we believe that a unit of guards at one of the employer's plants and related warehouses would also be appropriate."

The *E-Z Davies Chevrolet* case, supra, actually involves two cases. They are: *National Labor Relations Board v. E-Z Davies Chevrolet* and *National Labor Relations Board v. Carl Simpson Buick, Inc.* The respondent companies are automobile dealers and are members of the Peninsula Automobile Dealers Association. The Professional Automobile Salesmen, Drivers and Demonstrators, Local No. 960, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed separate election petitions in which it sought to represent two bargaining units, each composed of the salesmen of one of the companies.

The regional Director rejected the companies' contention that only a multi-employer unit was appropriate. He directed that the requested elections be held and the Board denied the companies' request for review.

In *E-Z Davies,* the companies had refused to recognize the union or to bargain with them. The union filed charges and complaints were issued. The complaints charged that the companies, by their refusal to bargain, had violated Section 8(a)(1) of the Labor-Management Relations Act, 1947, as Amended. The Respondents denied in their Answers that they had violated the Act; however, the Board granted motions for summary judgment. The Ninth Circuit Court of Appeals upheld the Board's determination, holding that the bargaining unit selected by the Board was appropriate.

The facts of the case at bar make it clear that the *Seagram* doctrine (announced in 101 NLRB 101 (1952)) need not apply. Where in *E-Z Davies,* the Peninsula Automobile Dealers Association had only been negotiating with representatives of the mechanics and repairmen for its members successfully since 1953, the Association, on behalf of its members—including Valley Ford Sales, Inc., and its predecessors, has been bargaining with the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87, for some 30 years. In fact, a contract has been in existence between the respective parties for 30 years. During this time the Company, or its

predecessors, has been a member of the Association. In the *Seagram* case, supra, the employer had only been bargaining for about 15 years at the time the case arose. And, in *Seagram,* the company had been bargaining with many unions, quite apart from the union which was at that time seeking to represent plant guards. In *Seagram,* a new union sought to represent an unrepresented group of employees employed by the employer. The same situation existed in the *E-Z Davies* case. Whereas, in the case at bar, the Association has an agreement with the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87, which covers the mechanics and parts men employed by the individual members of the Association. The same union now seeks to represent the salesmen.

On at least three prior occasions, the Board has found the appropriate bargaining unit to be all of the new and used car salesmen of the members of the Association rather than salesmen of any particular dealer. However, there was no such experience at all in *Seagram* and in the *E-Z Davies* cases. On two prior occasions, the Board had found that the appropriate bargaining unit was the salesmen of all members of the Peninsula Automobile Dealers Association. Furthermore, in the case at bar, on at least one prior occasion, the multi-employer group had bargained with a union representing the salesmen of all members of the Fresno Motor Car Dealers Association for over one year. No such facts are revealed in the *E-Z Davies* or *Seagram* cases.

In the *Seagram* case, the employer's plants were spread over several states. The Board, in its Opinion, made it quite clear that it thought it would be an undue burden upon the union to attempt to organize guards in plants over such a wide area. In *E-Z Davies*, from the Opinion of the Ninth Circuit and from the testimony at the hearing in this matter, it becomes apparent that the same situation existed as existed in *Seagram*. That is, there are 56 members of the Peninsula Automobile Dealers Association, of which E-Z Davies and Carl Simpson Buick are members, operating in a 500-square-mile area covering approximately two counties. The population of the area is 691,000 people. Furthermore, there are twice as many employees employed by the Peninsula Automobile Dealers Association as employed by the Fresno Motor Car Dealers Association. The Fresno Motor Car Dealers Association operates in a 50-square-mile area and has only 11 members. The population of the area is only about 171,000. It becomes obvious that the facts which would warrant *Seagram* and *E-Z Davies* opinions simply do not exist in this case. There is no particular burden upon the union in this case to have the unit consist of the new and used car salesmen of all of the members of the Fresno Motor Car Dealers Association.

What may be termed as the modified *Seagram's* rule has been followed by the Board in subsequent cases. Analysis of them shows that where the Board has ruled in favor of the single plant or employer unit in face of a bargaining history on a wider basis for other employees, it involved a situation where a new

and different union sought to establish a single unit, or where there was no fixed pattern of multi-plant or multi-employer bargaining for the other employees, or that the unit sought for the unrepresented employees by another union was not quite coextensive with the established multi-plant or multi-employer unit.

The more recent cases have revealed that the Board has not abandoned the rule in existence prior to the *Seagram* case, supra. That is, under the appropriate conditions, the unit composed of employees of a multi-employer group will be approved by the Board. One of the first cases after *Seagram* which makes this evident was *Peninsula Automobile Dealers Association*, 107 NLRB 56 (1953). In that case, the union sought to represent all of the salesmen employed by members of the Peninsula Automobile Dealers Association. More recent cases include *Los Angeles Statler Hilton Hotel*, 129 NLRB 1349 (1961) (unrepresented hotel workers—multi-hotel unit found to be appropriate). *Dancker & Sellew, Inc.*, 140 NLRB 824 (1963) (office and sales employees—association-wide unit found to be appropriate). More recently, the Board has even found that sales personnel of retail chain stores may be grouped into a unit composed of all such stores operating within a particular state. *Adams Drug Company, Inc.*, 164 NLRB 71 (1967). Also see *Steamship Trade Association of Baltimore*, 60 LRRM 1257 (1965) and *NLRB v. Purity Food Stores*, 61 LRRM 2067 (1967).

The case at bar is very similar to *Morgan Linen Service, Inc., et al.*, 131 NLRB 420 (1961). In that

case, the petitioner (union) sought to represent the drivers and helpers of three employers in three separate units. The employers and unions representing other employees contended that the petition should be dismissed on the grounds that (1) the unit sought was inappropriate because it did not embrace an industry-wide, multi-employer unit in the laundry industry in Metropolitan New York City; and (2) the employees sought by petitioner could not be properly severed from the existing production and maintenance unit. (The petitioner in the alternative sought a unit the same size as a previously existing multi-employer unit).

In the *Morgan Linen Service* case, the Board dismissed the petition even though the employers had technically withdrawn from a large association representing employers in the industry. However, thereafter, the employers permitted the association to bargain on their behalf. The Board said, at 422:

> "The Board has held that an essential element for establishing a multi-employer unit is participation by a group of employers whether members or nonmembers of an association, either personally or through an authorized representative, in joint bargaining negotiations unequivocally manifesting the intent to be bound by group rather than by individual action. (Cit. omitted.) The three employers have bargained continuously with *Amalgamated* (the unions representing employees covered by labor agreements) for twenty-three years. They were represented by a joint bargaining committee chosen by their representative, the Institute, and after the Institute was dissolved,

continued to bargain through the same joint representative. They have regularly executed the standard and uniform contracts resulting from the joint industry-wide bargaining negotiations. The employers indicate they will continue to engage in such joint bargaining. The record in our opinion clearly establishes that the employers herein have effectively participated in the joint bargaining as part of an industry-wide multi-employer group, which we accordingly find to have been manifested as the appropriate unit for purposes of collective bargaining . . .

"*Accordingly, as the units requested by petitioners are limited either to individual employers or a segment of employers in the appropriate multi-employer unit, we find that unit or the unit sought are too narrow in scope and, therefore, inappropriate for purposes of collective bargaining.*" (Emphasis added.)

II

THE PETITION FILED HEREIN BY THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE NO. 87 WAS NOT EXECUTED BY AN EMPLOYEE, AGENT, REPRESENTATIVE OR OFFICER OF SAID DISTRICT LODGE NO. 87.

The party signing the petition was not an employee, official, or agent of District Lodge No. 87. Therefore, the petition has not been signed by an authorized representative of District Lodge No. 87. It does not purport to be signed by an "individual" as referred to in Section 9(c)(1)(A) of the Act. It purports

to be filed by a labor organization representing employees of Valley Ford Sales, Inc., doing business as Friendly Ford (formerly doing business as Paul Johnson Ford); however, the authority for the one signing the petition was not established at the hearing.

This matter seems to be a case of first impression. It is true that customarily an employer may not question the authority of the labor organization to act on behalf of the employees who claim to be represented in the petition. *Sorg Paper Company*, 8 NLRB 657 (1938) and *Wilson and Company, Inc.*, 15 NLRB 195 (1939). However, the *Sorg* and *Wilson* cases, supra, are quite different from the case at bar in that in this case, Mr. Byrnes, the party signing the petition, has admitted that he is not qualified to act on behalf of District Lodge No. 87.

III

THE HEARING OFFICER ERRED IN PERMITTING MR. ROY WHITELY TO TESTIFY TO THE CONTENTS OF RULES OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO OVER COUNSEL'S (FOR EMPLOYER AND INTERVENOR) OBJECTION THAT SUCH TESTIMONY WAS NOT THE BEST EVIDENCE AND THEREFORE SHOULD BE STRICKEN.

During the hearing, Mr. Byrnes asked Mr. Whitely, "I would like to ask you, why is it you don't file your own NLRB petition?" Answered Mr. Whitely, "Because of the rules set down by the International, we go through the, whichever NLRB region that's

assigned to our territory, which in this case is the 20th Region, and have to go through the Grand Lodge Office."

Counsel for the Company objected and asked that the answer be stricken on the ground that it was not the best evidence. Counsel argued that the best evidence would be the rules, constitution, and by-laws of either the International or District Lodge No. 87. The objection was overruled, but was properly made a part of the record. Section 102.66(b) Rules and Regulations and Statements of Procedure of the National Labor Relations Board.

The failure to strike the answer is a denial of due process and therefore a violation of the Fifth Amendment to the Constitution of the United States. It is obvious that the answer asked the witness to recall something from memory where the information would have been available in writing to either the witness or Mr. Byrnes and could have been produced at the hearing. Therefore, to introduce this evidence was prejudicial, and denied the Company and Intervenor a fair hearing. The mere fact that rules of evidence do not apply to such proceedings does not mean that the Employer is not entitled to a fair hearing. *Tri-State Broadcasting Company v. FCC*, 96 F.2d 564 (1938).

CONCLUSION

Fresno Motor Car Dealers Association has been negotiating as a multi-employer group with the District Lodge No. 87 for approximately thirty years. District Lodge No. 87 has entered into a Labor Agreement with the multi-employer group on behalf of the mechanics and parts men employed by members of the multi-employer group. At this time, the Union and the Board would ignore this past history and bargain for the salesmen on a single employer unit basis. This is neither warranted by the facts nor the law, and therefore, the approporiate bargaining unit includes all the new and used car salesmen of members of the Association.

The representation petition was not signed by an authorized employee or officer of District Lodge No. 87 and thus was not properly before the Board.

The Hearing Officer committed error in this case permitting evidence contrary to the best evidence rule and thereby preventing the Company from receiving a fair and impartial hearing.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, Fresno, California,
April 19, 1972.

WM. M. MILES,
JAMES M. BELL,
Attorneys for Petitioner.

(Appendices Follow)

Appendix I

United States of America
Before the National Labor Relations Board

Case 20-CA-5585

Valley Ford Sales, Inc.,
d/b/a Friendly Ford (formerly
d/b/a Paul Johnson Ford),
and
International Association of Machinists
and Aerospace Workers, AFL-CIO,
District Lodge No. 87

DECISION AND ORDER

Upon a charge filed by the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87, herein called the Union, the General Counsel for the National Labor Relations Board, by the Regional Director for Region 20, issued a complaint dated June 4, 1969, against Valley Ford Sales, Inc., herein called the Respondent, alleging that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as

amended. Copies of the charge, complaint, and notice of hearing were duly served upon the Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on February 12, 1969, a majority of the employees, in a unit found appropriate by the Acting Regional Director for Region 20 of the Board,[1] in a secret-ballot election conducted under the supervision of the Regional Director for Region 20, of the National Labor Relations Board, designated and selected the Union as their representative for the purposes of collective bargaining, and on February 20, 1969, said Regional Director certified the Union as the exclusive collective-bargaining representative of the employees in said unit. The complaint further alleges that since on or about May 6, 1969, and at all times thereafter, the Respondent did refuse, and has continued to refuse, to bargain collectively with the Union as the exclusive collective-bargaining representative of its employees. On or about June 7, 1969, the Respondent filed its answer, admitting in part, and denying in part, the allegations of the complaint, presenting an affirmative defense, and requesting that it be found not to have violated the Act.

On August 12, 1969, the General Counsel filed with the Board a Motion for Summary Judgment alleging that there are no factual issues which would warrant a hearing. Thereafter, on August 15, 1969, the Board issued an Order Transferring Proceeding to the Board

[1]Decision and Direction of Election issued January 3, 1969, in Case 20-RC-8363 (not printed in NLRB volumes).

and Notice of Show Cause. On August 19, 1969, the Respondent filed its Opposition to Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board makes the following:

Rulings on the Motion for Summary Judgment

Pursuant to a petition filed on September 25, 1968, by the Machinists, seeking to represent certain employees of the Respondent, a hearing was held on October 16, 1968. On January 3, 1969, the Acting Regional Director for Region 20 issued a Decision and Direction of Election finding the following unit of employees appropriate and directing an election:

> All new car, used car, fleet and truck department salesmen employed at the Employer's Fresno, California operations, excluding all other employees, guards and supervisors as defined in the Act.

The Respondent's Request for Review of this Decision was denied by telegraphic Order of the Board on January 30, 1969.

On February 12, 1969, pursuant to the Decision and Direction of Election, an election was held among the employees in the unit described above, to determine whether or not they desired to be represented for collective-bargaining purposes by International Association of Machinists and Aerospace Workers, AFL-CIO,

District Lodge No. 87. The tally of ballots showed that 11 votes were cast for the Union, 4 against the Union, and 5 were challenged. Thereafter, a Certification of Representative was issued to the Union on February 20, 1969.

By a letter dated April 17, 1969, the Union requested the Respondent to bargain collectively. The Respondent refused by a letter dated May 6, 1969. On May 13, 1969, the Union filed the charge upon which the complaint herein was predicated.

In its Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment, the Respondent contends in substance: (1) that the petition filed in Case 20-RC-8363 should have been dismissed on the ground that it was not signed by an authorized representative of the Petitioner; (2) that the Regional Director erred in failing to dismiss the petition for failure to encompass the appropriate bargaining unit; (3) that the conduct of the hearing resulted in prejudicial error by virtue of the Hearing Officer's refusal to strike testimony regarding the contents of rules of the Petitioner, such testimony not being the best evidence; and, (4) that the Petitioner is creating the possibility of labor strife by splintering the bargaining units.

Respondent's contentions seek to relitigate contentions made prior to and rejected in the Regional Director's decision in Case 20-RC-8363[2] and in the

[2]We have again examined the Decision and Direction of Election in Case 20-RC-8363 and made an independent review of the record of the hearing in the representation case and conclude that the Regional Director's findings were correct.

Board's denial of Respondent's Request for Review of that decision. Inasmuch as Respondent has already litigated such contentions, it has not raised any issue which is properly triable in this proceeding.[3]

As all material issues have been previously decided by the Board, or admitted by Respondent's answer to the complaint, there are no matters requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted. On the basis of the record before it, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is and at all times material herein has been a California corporation with an office and place of business located in Fresno, California, where it has been engaged in the retail sale of new and used automobiles. During the past year, a representative period, Respondent, in the course and conduct of its business operations, made retail sales of goods and services valued in excess of $500,000. During the same period, Respondent purchased and received goods and materials valued in excess of $50,000 from Ford Motor Company, San Jose, California Division, which company purchased and received goods and materials valued in excess of $50,000 directly from outside the State of California.

Respondent admits, and we find, that Respondent is, and has been at all times material herein, an employer

[3] *E-Z Davies Chevrolet*, 161 NLRB 1380, enfd. 395 F.2d 191 (C.A. 9).

engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87 is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation proceeding*

1. The Unit

The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All new car, used car, fleet and truck department salesmen employed at the Employer's Fresno, California operations, excluding all other employees, guards and supervisors as defined in the Act.

2. The Certification

On February 12, 1969, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 20, designated the Union as their representative for the purposes of collective bargaining with the Respondent, and on February 20, 1969, the Regional Director certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

B. *The request to bargain and Respondent's refusal*

Commencing on or about April 17, 1969, and continuing to date, the Union has requested and is requesting the Respondent to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit. Since May 6, 1969, and continuing to date, the Respondent has refused and continues to refuse to bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly, we find that the Union was duly certified as the collective-bargaining representative of the employees of the Respondent in the appropriate unit described above and that the Union at all times since February 20, 1969, has been and now is the exclusive bargaining representative of all the employees in the aforesaid unit, within the meaning of Section 9(a) of the Act. We further find that the Respondent has since May 6, 1969, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit. By such refusal the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The acts of the Respondent set forth in Section III above, occurring in connection with its operations as described in Section I above, have a close, intimate,

and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial year of certification as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See: *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

VI. Conclusions of Law

1. Valley Ford Sales, Inc., d/b/a Friendly Ford (formerly d/b/a Paul Johnson Ford), is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All new car, used car, fleet and truck department salesmen employed at the Employer's Fresno, California operations, excluding all other employees, guards and supervisors as defined in the Act.

4. Since February 20, 1969, the Union has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. By refusing on or about May 6, 1969, and at all times thereafter, to bargain collectively with the Union as the exclusive bargaining representative of all the employees in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Valley Ford Sales, Inc., Fresno, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment with the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All new car, used car, fleet and truck department salesmen employed at the Employer's Fresno, California operations, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of

all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business in Fresno, California, copies of the attached Notice marked "Appendix."[4] Copies of said Notice, on forms provided by the Regional Director for Region 20 shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said Notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 20, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C., May 22, 1970.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member

(Seal) National Labor Relations Board

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[4]In the event this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

Appendix

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE NO. 87, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all our employees in the bargaining unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All new car, used car, fleet and truck department salesmen employed at the Employer's Fresno, Cal-

ifornia operations, excluding all other employees, guards and supervisors as defined in the Act.

Valley Ford Sales, Inc.,
d/b/a Friendly Ford (formerly
d/b/a Paul Johnson Ford)

Dated By

(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced By Anyone

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 13050 Federal Bldg.—Box 36047, 450 Golden Gate Ave., San Francisco, Calif. 94102, Telephone 415-556-3197.

Appendix II

AMENDED JUDGMENT

United States Court of Appeals
for the Ninth Circuit

Nos. 26,785 and 26,839

National Labor Relations Board,
Petitioner,

vs.

Valley Ford Sales, Inc., d/b/a Friendly Ford (formerly d/b/a Paul Johnson Ford),
Respondent.

JUDGMENT

Before: DUNIWAY, CARTER, and HUFSTEDLER, Circuit Judges.

This Cause came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against the Respondent, Valley Ford Sales, Inc., d/b/a Friendly Ford (formerly d/b/a Paul Johnson Ford), its officers, agents, successors, and assigns on May 22, 1970 and corrected on September 17, 1970. The Court heard

argument of respective counsel on December 7, 1971, and has considered the briefs and transcripts of record filed in this cause. On December 23, 1971, the Court being fully advised in the premises, handed down its order granting enforcement of the Board's order as corrected. In conformity therewith, it is hereby

Ordered and Adjudged by the United States Court of Appeals for the Ninth Circuit that the Respondent, Valley Ford Sales, Inc., d/b/a Friendly Ford (formerly d/b/a Paul Johnson Ford), its officer, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours and other terms and conditions of employment with the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 87 (hereinafter called labor organization), as the exclusive bargaining representative of its employees in the following appropriate unit:

> All new car, used car, fleet and truck department salesmen employed at the Employer's Fresno, California operations, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the National Labor Relations Act, as amended (hereinafter called the Act).

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act, as amended.

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business in Fresno, California, copies of the attached Notice marked "Appendix." Copies of said Notice, on forms provided by the Regional Director for Region 20, (San Francisco, California) shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said Notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Judgment, what steps Respondent has taken to comply herewith.

So Ordered
/s/ Ben C. Duniway
/s/ James M. Carter
/s/ Shirly Hufstedler

Enforced, Judgment Filed and Entered
Jan. 28, 1972

/s/ William B. Luck
William B. Luck

A True Copy
Attest: Jan. 31, 1972
William B. Luck
Clerk

With costs in this Court in
favor of the Board and against
the respondent.

Costs: One-half claimed cost
of brief of the Board $41.63

A True Copy
Attest Feb. 24, 1972
Wm. B. Luck, Clerk
By R. D. Hewitt, Deputy

Filed Jan. 28, 1972,
Wm. B. Luck, Clerk.

Appendix

NOTICE TO EMPLOYEES

Posted

Pursuant A

Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board, an agency of the United States Government

WE WILL NOT refuse to bargain collectively with the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE NO. 87, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all our employees in the bargaining unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All new car, used car, fleet and truck department salesmen employed at the Employer's Fresno, Cal-

ifornia operations, excluding all other employees, guards and supervisors as defined in the Act.

Valley Ford Sales, Inc.,
d/b/a Friendly Ford (formerly
d/b/a Paul Johnson Ford)

Dated By

(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced By Anyone

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 13018 Federal Bldg.—Box 36047, 450 Golden Gate Ave., San Francisco, Calif. 94102, Telephone 415-556-3197.

United States Court of Appeals
for the Ninth Circuit

No.

National Labor Relations Board,
Petitioner,

vs.

Valley Ford Sales, Inc., d/b/a Friendly Ford (formerly d/b/a Paul Johnson Ford),
Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above-captioned case has this day been served by air mail upon the following counsel at the address listed below:

Crossland, Crossland, Richardson
and Casswell
Att: James M. Bell, Esquire
Guarantee Savings Building
1171 Fulton Mall
Fresno, California 93721

/s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D.C. this 29th day of December, 1971.

Appendix III

LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED:

§8(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employes in the exercise of the rights guaranteed in section 7; . . .

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

§9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against

employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

§9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); . . ."

§10(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file

in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial

evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of title 28.

RULES AND REGULATIONS AND STATEMENT OF PROCEDURES PROMULGATED BY NATIONAL LABOR RELATIONS BOARD.

§102.66 (b) provides:

"Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing."